Ong Ban Chai & Ors v Seah Siang Mong

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO J-02-51 OF 1997
NH CHAN, ABDUL MALEK AHMAD AND MOKHTAR SIDIN JJCA
1 JUNE 1998

Contract *— Undue influence — Agreement for sale and purchase of land — Respondent did not have independent solicitor to act for him — First appellant was interested party — Conflict of interest — Whether judge was correct in finding undue influence and breach of trust*

Land Law *— Sale of land — Caveat — Agreement to transfer land — Repondent entered caveat after execution of agreement — Whether caveat was defective — Whether removal was in order*

Land Law *— Sale of land — Fraud alleged — First appellant used power of attorney to transfer respondent's share of the land to himself — No payment of purchase price or set-off — Whether first appellant entitled to use power of attorney — Whether first appellant had committed fraud — Contracts Act 1950 s 17*

Land Law *— Title — Indefeasibility of title — Fourth appellant acquired land from first appellant — Good faith and valuable consideration — Knowledge of adverse claim — Judge held fourth appellant not bona fide purchaser — Whether judge had erred in law*

The first appellant and the respondent signed an agreement of sale and irrevocable power of attorney ('the 1980 agreement') in respect of three lots of land in Johor Bahru which the respondent and his brother each held one half undivided share. The respondent sold his half share to the first appellant and his brother sold his undivided half share of those lots to the fourth appellant free from encumbrances. The first appellant contended that he had given a total sum of RM682,000 to the respondent as friendly loans and the first appellant had never demanded for repayment. Since the respondent was unable to pay his debt, he and the respondent agreed orally to treat the friendly loans given to the respondent as a set-off against the selling price for the respondent's undivided half share in the said land. This was contradicted by the respondent who said that he had never agreed to that.

The first appellant later made use of the irrevocable power of attorney given by the respondent to him and transferred the half share of the respondent to himself. By a sale and purchase agreement dated 28 February 1989 ('the 1989 agreement'), the first appellant, as the registered proprietor of the undivided one half share of the land, and the respondent's brother for his undivided half share through the power of attorney given by him to the first appellant, sold the said land to the second and third appellants free from all encumbrances. The respondent then entered a private caveat against the land which was removed by the Registrar of Titles. In the High Court, the trial judge gave decision in favour of the respondent and ordered, inter alia, one half undivided share in the three lots of land be registered in the name of the respondent.

On appeal, the court had to decide: (i) whether the first appellant had acted fraudulently against the respondent in using the power of attorney granted by the respondent to transfer his undivided half share to the first appellant himself; (ii) whether the first appellant, second appellant, third appellant and fourth defendant have conspired to defraud the respondent of his undivided half share in the land; and (iii) whether the second and third appellants and their nominee the fourth appellant are bona fide purchasers of the undivided half share from the first appellant. At the same time, the respondent filed a cross-appeal seeking variations of the decisions of the judge.

Held, dismissing the first appellant's appeal but allowing the second, third and fourth appellants' appeal:

(1) Without the knowledge and consent of the respondent, and without paying any purchase money to the respondent under the 1980 agreement, the first appellant transferred to himself the respondent's undivided half share in the three lots of land and charged that share to the bank for his own benefit, thus depriving the respondent of his own interest in the property. By this overt act, the first appellant had committed fraud within the ambit of s 17 of the Contracts Act 1950. Moreover, there are no express provisions in the 1980 agreement to authorize the first appellant to deduct the purchase price from or set it off against the debt owing by the respondent to the first appellant. Without any proper document to set off the purchase price against the friendly loans to the respondent, the first appellant was not entitled to use the power of attorney to transfer the respondent's undivided half share into his own name (see p 359B–D).

Furthermore, although the terms and conditions of the 1980 agreement had been explained to the respondent before he signed it, at the material time he had no independent solicitor to advise and act for him in the transaction. As the first appellant was an interested party and there was a conflict of interest, he should have advised the respondent and insisted that the latter be represented by his own solicitor, so that any fraudulent act or improper conduct could be avoided in the best interest of both the contracting parties. The trial judge was, on the evidence, right in law in finding undue influence and breach of trust committed by the first appellant against the respondent. There are no reasons to interfere with those findings (see pp 359G and 360C).

(2) The respondent's evidence on conspiracy is not credible. On the evidence, the judge found that the respondent had failed to prove his case against the fourth defendant. The respondent did not appeal against the specific findings of the judge. Failure on the part of the respondent to appeal against the specific material findings by the judge would inevitably mean that the respondent had accepted those findings which would have the legal effect of totally demolishing his charge of conspiracy to defraud (see pp 360D–E and 361B).

(3) The caveats of the respondent were entered after the execution of the 1989 agreement against the whole of the three lots of land when he claimed only one half of each lot. The caveats are therefore defective and cannot be allowed to remain on the register. The respondent did not challenge this removal under s 418(1) of the National Land Code 1965 ('the NLC'). The judge, having found that the plaintiff had failed to prove that the defendants have conspired to deprive him of his property and that the removal of the caveats of the respondent was also to be in order, should have found the title of the fourth appellant indefeasible and protected by s 340(3) of the NLC, as it was acquired in good faith and for valuable consideration from the first appellant. The judge had erred in law in ordering the half share to be registered in favour of the respondent. The trial judge also erred when holding that a person is not a bona fide purchaser until he has paid the full purchase price. In order to be a bona fide purchaser, one should have contracted in good faith for value, and knowledge of an adverse claim is not fraud. The material time is the time of the transaction (see pp 362E, 363F and 372H–I); *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 distinguished and *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465 followed.

Per curiam:

A distinction is drawn between criminal fraud and civil fraud in *Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (Personal representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45, which will have a bearing on the standard of proof by the person alleging fraud. Where the allegation of fraud in civil proceedings concerns criminal fraud such as conspiracy to defraud or misappropriation of money or criminal breach of trust, the burden of proof is the criminal standard of proof beyond reasonable doubt, and not on balance of probabilities. An allegation of criminal fraud in civil or criminal proceedings cannot merely be based on suspicion or speculation (see p 358B–D).

[Bahasa Malaysia summary

Perayu pertama dan penentang telah menandatangani satu perjanjian jualan dan surat kuasa wakil yang tidak boleh dibatal ('perjanjian 1980 tersebut') berhubung tiga lot tanah di Johor Bahru yang mana penentang dan adiknya setiap seorang memegang setengah bahagian yang tidak berbahagi. Penentang telah menjual setengah bahagiannya kepada perayu pertama dan adiknya telah menjual setengah bahagiannya daripada lot-lot tersebut kepada perayu keempat bebas daripada bebanan. Perayu pertama menegaskan bahawa beliau telah memberikan jumlah sebanyak RM682,000 kepada penentang sebagai pinjaman secara berbaik-baik dan perayu pertama telah tidak pernah menuntut untuk mendapatkan pembayaran balik. Oleh kerana penentang tidak dapat membayar hutangnya, beliau dan penentang

telah bersetuju secara lisan untuk menganggap pinjaman berbaik-baik yang diberikan kepada penentang sebagai tolakan terhadap harga jualan bagi setengah bahagian penentang yang tidak berbahagi dalam tanah tersebut. Ini telah disangkal oleh penentang yang menyatakan bahawa beliau tidak pernah bersetuju kepada perkara itu.

Perayu pertama kemudiannya telah menggunakan surat kuasa wakil tidak boleh dibatal yang diberikan oleh penentang kepada beliau dan memindahkan setengah bahagian penentang tersebut kepada dirinya. Melalui satu perjanjian jualbeli bertarikh 28 Februari 1989 ('perjanjian 1989 tersebut'), perayu pertama sebagai tuanpunya, berdaftar setengah bahagian tidak berbahagi tanah tersebut, dan adik penentang bagi setengah bahagian yang tidak berbahagi melalui surat kuasa wakil yang diberikan olehnya kepada perayu pertama, telah menjual tanah tersebut kepada perayu-perayu kedua dan ketiga bebas daripada kesemua bebanan. Penentang kemudiannya telah memasukkan satu kaveat persendirian terhadap tanah itu yang mana telah dibatalkan oleh Pendaftar Hakmilik. Di Mahkamah Tinggi, hakim perbicaraan telah memberi keputusan yang memihak kepada penentang dan telah memerintahkan, antara lainnnya, setengah bahagian tidak berbahagi dalam ketiga-tiga lot itu didaftarkan atas nama penentang.

Ketika rayuan, mahkamah terpaksa memutuskan: (i) sama ada perayu pertama telah bertindak secara fraud terhadap penentang dalam menggunakan surat kuasa wakil yang diberikan oleh penentang untuk memindahmilik setengah bahagiannya yang tidak berbahagi kepada perayu pertama sendiri; (ii) sama ada perayu pertama, perayu kedua, perayu ketiga dan defendan keempat telah berkomplot untuk 'defraud' penentang dari setengah bahagiannya yang tidak berbahagi dalam tanah tersebut; (iii) sama ada perayu-perayu kedua dan ketiga dan penerima namaan mereka perayu keempat merupakan pembeli bona fide setengah bahagian yang tidak berbahagi itu daripada perayu pertama. Pada masa yang sama, penentang telah memfailkan rayuan balas memohon perubahan-perubahan akan keputusan-keputusan hakim tersebut.

Diputuskan, menolak rayuan perayu pertama tetapi membenarkan rayuan perayu-perayu kedua, ketiga dan keempat:

(1) Tanpa pengetahuan dan kebenaran penentang, dan tanpa membayar apa-apa wang pembelian kepada penentang di bawah perjanjian 1980, perayu pertama telah memindahkan kepada dirinya setengah bahagian yang tidak berbahagi kepunyaan penentang dalam ketiga-tiga lot tersebut dan telah menggadaikan bahagian itu kepada bank untuk kemanfaatannya sendiri, dengan itu melucut hak penentang akan kepentingannya sendiri dalam hartanah tersebut. Melalui perbuatannya yang terang-terangan, perayu pertama telah melakukan fraud dalam lingkungan s 117 Akta Kontrak 1950. Lagipun, tidak terdapat peruntukan-peruntukan nyata dalam perjanjian 1980 bagi membenarkan perayu pertama untuk menolak harga belian daripada atau terhadap hutang yang terhutang oleh penentang kepada perayu

pertama. Tanpa sebarang dokumen yang sempurna untuk menolak harga belian terhadap pinjaman berbaik-baik itu kepada penentang, perayu pertama tidak berhak untuk menggunakan surat kuasa wakil bagi memindahmilik setengah bahagian penentang yang tidak berbahagi ke dalam namanya sendiri (lihat ms 359B–D)

Tambahan pula, walaupun terma-terma dan syarat-syarat perjanjian 1980 telah diperjelaskan kepada penentang sebelum beliau menandatanganinya, pada waktu yang material itu, beliau tidak mempunyai peguamcara yang bebas untuk menasihatnya dan mewakilinya dalam transaksi tersebut. Oleh kerana perayu pertama merupakan pihak yang berkepentingan dan terdapatnya konflik kepentingan, beliau seharusnya menasihati penentang dan mendesak supaya pihak terkemudian itu diwakili oleh peguamcaranya yang tersendiri, supaya sebarang perbuatan fraud atau perlakuan tidak wajar boleh dielakkan demi kepentingan kedua-dua pihak yang memasuki kontrak itu. Hakim perbicaraan adalah, berdasarkan keterangan tersebut, betul di sisi undang-undang dalam memutuskan pengaruh yang tidak wajar dan kemungkiran amanah yang dilakukan oleh perayu pertama ke atas penentang. Tiada terdapat sebab untuk masuk campur dalam keputusan-keputusan itu (lihat ms 359G dan 360C).

(2) Keterangan penentang mengenai komplot tidak sahih. Berdasarkan keterangan, hakim tersebut mendapati bahawa penentang telah gagal untuk membuktikan kes beliau terhadap defendan keempat. Penentang tidak merayu terhadap keputusan spesifik hakim tersebut. Kegagalan pihak penentang untuk merayu terhadap keputusan spesifik yang penting oleh hakim bermakna bahawa penentang telah menerima keputusan-keputusan itu yang mana mempunyai kesan undang-undang yang memusnahkan keseluruhan tuduhan komplot oleh beliau untuk melakukan fraud (lihat ms 360D–E dan 361B).

(3) Kaveat-kaveat penentang telah dimasukkan selepas penyempurnaan perjanjian 1980 terhadap keseluruhan daripada ketiga-tiga lot tanah apabila beliau menuntut hanya setengah bahagian daripada setiap satu lot. Kaveat-kaveat tersebut dengan itu adalah tidak sempurna dan tidak boleh dibenarkan kekal pada daftar. Penentang tidak mencabar pembatalan ini di bawah s 418(1) Kanun Tanah Negara ('KTN'). Hakim tersebut, setelah mendapati bahawa plaintif telah gagal untuk membuktikan bahawa defendan-defendan telah berkomplot untuk melucut haknya dari hartanahnya dan bahawa pembatalan kaveat-kaveat penentang tersebut haruslah juga menurut aturan, seharusnya telah mendapati hakmilik perayu keempat tidak boleh sangkal dan dilindungi oleh s 340(3) KTN, kerana ianya telah diperolehi dengan niat baik dan untuk balasan yang bernilai daripada perayu pertama. Hakim tersebut telah tersalah pertimbangan di sisi undang-undang dalam memerintahkan supaya setengah bahagian tersebut didaftarkan atas nama penentang. Hakim perbicaraan juga tersalah pertimbangan di sisi undang-undang ketika

memutuskan bahawa seseorang bukannya merupakan pembeli bona fide sehingga beliau telah membayar harga belian sepenuhnya. Untuk menjadi seorang pembeli bona fide, seseorang seharusnya telah mengikat kontrak dengan niat yang baik untuk nilai, dan mengetahui mengenai tuntutan yang bertentangan bukannya fraud. Masa yang material adalah masa transaksi (lihat ms 362E, 363F dan 372H–I); *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 dibeza dan *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465 diikut.

Per Curiam:

Satu perbezaan dibentuk antara fraud jenayah dan fraud sivil dalam *Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (Personal representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45, yang mempunyai kaitan dengan standard bukti oleh orang yang mendakwa fraud. Di mana dakwaan fraud dalam prosiding sivil berkaitan dengan fraud jenayah seperti berkomplot untuk melakukan fraud atau menyalah-gunakan wang atau pecah amanah jenayah, beban membukti adalah standard bukti jenayah yang di luar keraguan, dan bukannya atas imbangan kebarangkalian. Sesuatu dakwaan mengenai fraud jenayah dalam prosiding-prosiding sivil atau jenayah tidak boleh semata-mata berasaskan sangkaan atau spekulasi (lihat ms 358B–D).]

[*Editorial note*: The first appellant has filed an application for leave to appeal to the Federal Court on 23 February 1998, while the respondent has applied for leave to appeal to the Federal Court vide Application No 08–11–1998 (J).

Notes

For a case on undue influence in an agreement for sale and purchase of land, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) para 2282.

For cases on caveat, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2498–2507.

For cases on fraud alleged in sale of land, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2554–2555.

For a case on indefeasibility of title, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) para 2889.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770 (distd)

Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (Personal representative of the estate of Chan Weng Sun, deceased) [1997] 2 MLJ 45 (refd)

Assets Co Ltd v *Mere Roihi & Ors* [1905] AC 176 (refd)

Baron Uno Carl Samuel Akerhielm v Rolf De Mare & Anor [1959] AC 789 (refd)

Boonsom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62 (refd)
Datuk Jagindar Singh & Ors v Tara Rajaratnam [1983] 2 MLJ 196 (refd)
Doshi v Yeoh Tiong Lay [1975] 1 MLJ 85 (refd)
Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212 (refd)
Goh Hooi Yin v Lim Teong Ghee & Ors [1990] 3 MLJ 23 (refd)
Land Executive Committee of the Federal Territory v Syarikat Harper Gilfillan Bhd [1981] 1 MLJ 234 (refd)
Letchemy Arumugan v N Annamalay [1982] 2 MLJ 198 (refd)
M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294 (refd)
Mosbert Bhd v Stella D'Cruz [1985] 2 MLJ 446 (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465 (folld)
Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat & Anor [1992] 2 MLJ 68 (refd)
Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors [1983] 1 MLJ 81 (refd)
Teh Bee v K Maruthamuthu [1977] 2 MLJ 7 (refd)
WJ Alan & Co Ltd v El Nasr Export & Import Co [1972] 2 All ER 127 (refd)
Waimiha Sawmilling Co Ltd (In Liquidation) v Waione Timber Co Ltd [1926] AC 101 (refd)
Wu Shu Chen (Sole executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin [1997] 2 MLJ 487 (refd)

Legislation referred to

Contracts Act 1950 s 17
National Land Code 1965 ss 89, 251(1), 258, 323, 340, 417, 418, 433B, 433C
Rules of the Court of Appeal 1994 r 8(1)
Specific Relief Act 1950 s 26

Appeal from: Suit No 22–90 of 1990 (High Court, Johor Bahru)

Wong Kim Fatt (*Gulam & Wong*) for the first, second and third appellants.
Manjit Singh (*Gulam & Wong*) for the fourth appellant.
Arthur Lee Meng Kwang (*Yap Siong Cheng* with him) (*Arthur Lee & Co*) for the respondent.

Mokhtar Sidin JCA (delivering judgment of the court): The four appellants who were the defendants in the court below appealed against the decision of the learned trial judge of the High Court made on 17 December 1996. Originally at the High Court there were two civil suits, namely Civil Suit No 22–90–1990 and Civil Suit No 22–358–1994. In Civil Suit No 22–90–1990 the respondent, Mr Seah Siang Mong, was the plaintiff and the first appellant, Mr Ong Ban Chai, was the defendant. In Civil Suit No 22–358–1994, the respondent was the plaintiff but there were five defendants, namely the four appellants in the present appeal and M/s Lim, Han &

A Teoh, a firm of advocates and solicitors (of which Mr YY Han is senior partner), which is not a party in the present appeal. The learned trial judge gave decision in favour of the respondent and ordered, inter alia, one half undivided share in the three lots of land which is the subject matter of this appeal (which was at the material time the half share that was transferred by the first appellant to the fourth appellant) be registered in the name of the respondent. It was also ordered that the first appellant to pay costs and damages to the respondent to be assessed by the deputy registrar of the High Court.

The respondent filed a cross-appeal seeking variations of the decisions of the learned judge as follows:

(1) The learned judge's dismissal of the respondent's claim for damages for fraud and/or misrepresentation against the appellants and the fourth defendant and the order that the respondent bears the costs of the fourth defendant ought to be reversed; and

(2) The learned judge's dismissal of the respondent's claim that the transfer of the subject property to the fourth appellant was in contravention of ss 433B and 433C of the National Land Code 1965 and therefore null and void and ought to be reversed.

Fourth defendant's objection on cross-appeal by the respondent

At the hearing of this appeal which took place on 11 August 1997, learned counsel for the fourth defendant, Mr Khoo Eng Chin, raised a preliminary objection on the following grounds:

(1) His clients are not involved in the appeal and would not be affected by the cross-appeal.

(2) There was a specific finding made by the learned trial judge that the respondent had failed to prove his case against his clients and there is no appeal against that specific finding and the dismissal of the respondent's claim against his client's claim based on that specific finding.

(3) Any reversal of the learned trial judge's dismissal of the respondent's claim for damages for fraud and/or misrepresentation against the second and third appellants would not affect the learned trial judge's dismissal of the respondent's claim against his client.

Learned counsel for the respondent, Mr Arthur Lee Meng Kwang, contended that by serving the notice of cross-appeal on the fourth defendant, it had become a party to the appeal.

After hearing the submissions by both parties on the preliminary objection, we upheld the preliminary objection by the fourth defendant and dismissed with costs the respondent's notice of cross-appeal against the fourth defendant which is not an appellant or a party to the present appeal. We could not find any reason why the fourth defendant should appeal against the decision of the learned trial judge who had given decision in favour of the fourth defendant. The appellants in their appeal did not cite the fourth defendant as a respondent or a party to the present

appeal. Rule 8(1) of the Rules of the Court of Appeal 1994 reads as follows:

> It shall not be necessary for a respondent to give notice of appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the High Court should be varied, he may, at any time after entry of the appeal and not more than ten days after the service on him of the record of appeal, give notice of cross-appeal specifying the grounds thereof, to the appellant and any other party who may be affected by such notice, and shall file within the like period a copy of such notice, accompanied by copies thereof for the use of each of the Judges of the Court.

By merely serving his notice of cross-appeal on the fourth defendant, the respondent does not thereby make the fourth defendant a party to this appeal. The only way the respondent can make the fourth defendant a party to the present appeal is for the respondent to file his new notice of appeal and name the fourth defendant as a respondent. As such, we are of the opinion that the fourth defendant is not a party involved in or affected by a notice of cross-appeal served by the respondent.

It is to be noted that the respondent had not applied for leave to appeal against this order of ours.

Let us now turn to the main appeal itself.

On 12 August 1997, we dismissed with costs an application by the respondent to adduce before us fresh evidence. This evidence was available before the learned trial judge in the form of oral evidence to be given by the respondent's elder brother, Mr Seah Swee Mong. The respondent had also not applied for leave to appeal against our decision on this application. Since we had dismissed the application, we proceeded to hear the appeal. We had derived much assistance from the oral and written submissions of counsel for the various parties. We have the advantage of reading the written submissions made by learned counsel in the court below and the authorities cited to us. We took time to consider the submissions of the parties.

Facts

On 26 February 1980, an agreement of sale and irrevocable power of attorney (hereinafter referred to as 'the 1980 agreement') was signed between the first appellant and the respondent before the attesting solicitor, Mr Chew Whye Jee. It is not disputed that the sum of RM35,000 was not paid upon the execution and the respondent agreed that he was then indebted to the first appellant in the sum of RM61,000. The sale was in respect of three lots of land, namely (1) Lot 3287 CT 2092; (2) Lot 6081 CT 12970; and (3) Lot 6082 CT 12971, in the township of Johor Bahru, measuring in area some 163,894 sq ft. Both the respondent and his brother, Mr Seah Swee Mong, inherited those three lots upon the death of their mother, each of them holding one half undivided share. The respondent sold his half share to the first appellant. The other one half undivided share belonged to Mr Seah Swee Mong, brother of the respondent. Mr Seah Swee Mong had also sold his undivided half share of those lots to the fourth appellant free from encumbrances.

A Under the 1980 agreement, the respondent's undivided half share of those lots (about 81,947 sq ft) was sold to the first appellant. The selling price was RM409,735 which works out at about RM5 per sq ft. On the same day, another agreement of sale and irrevocable power of attorney was signed by the respondent's elder brother, Mr Seah Swee Mong, and the first appellant whereby Mr Seah Swee Mong sold his undivided half share B of the same land. This agreement and power of attorney was again attested by the same solicitor, Mr Chew Whye Jee. Mr Seah Swee Mong's half share of the land had since been registered in the name of the fourth appellant free from encumbrances after the removal of the respondent's private caveats in 1994.

C It was contended by the first appellant that for the period of April 1978 to July 1982, he had given a total sum of RM682,000 to the respondent as friendly loans. This, according to the first appellant, was evidenced by the various acknowledgements signed by the respondent, and the respondent had admitted in evidence they were friendly loans. The D respondent also stated that the first appellant had never demanded for repayment because he was interested in the proposed 25-storey condominium project to be developed on the said land, through a joint venture company by the name of Yang-Zhou Sdn Bhd. There is no evidence to show that the respondent was allotted any share in this company. It is also clear that the first appellant had not issued any notice E of demand to the respondent for repayment of the loans. The first appellant gave evidence that the proposed condominium project failed because of the poor market conditions in 1984. The first appellant also stated that since the respondent was unable to pay his debt, he and the respondent agreed orally to treat the friendly loans given to the respondent as a set-off F against the selling price for the respondent's undivided half share in the said land. This was contradicted by the respondent who said that he had never agreed to that.

On 7 May 1986, the first appellant made use of the irrevocable power of attorney given by the respondent to him and transferred the half share of the respondent to himself (the first appellant). By a sale and purchase G agreement dated 28 February 1989 (hereinafter referred to as 'the 1989 agreement'), the first appellant, as the registered proprietor of the undivided one half share of the said land, and Mr Seah Swee Mong for his undivided half share through the power of attorney given by him to the first appellant, sold the said land to the second and third appellants free from all H encumbrances at the total price of RM2,950,101. It is not disputed that Mr Seah Swee Mong received his full share of the purchase price in the sum of RM1,225,050.50 on 4 May 1991.

On 13 April 1990, the respondent's solicitors sent a letter dated 12 April 1990 to the solicitors for the second and third appellants, giving I notice of intended proceedings to be taken by the respondent. On 5 May 1990, the respondent entered a private caveat against the said land. On 10 May 1991, the fourth defendant, as solicitors for the second and third appellants, wrote to the first appellant's legal firm. This letter will be referred to later. On 25 November 1991, the second and third appellants paid the balance of the purchase price to the first appellant.

It is common ground that the respondent's private caveats entered on 5 May 1990 on the said land were removed on 20 March 1994 by the Registrar of Titles. It is also common ground that on 10 May 1994, the said land was registered in the name of the fourth appellant. For the period from 1991 to 1996, the second, third and fourth appellants paid the quit rent on the said land and they had also paid the sum of RM630,500 to the occupiers of the said land for vacant possession.

The issues in this appeal

These are the three principal issues for determination in this appeal:

(1) Whether the first appellant had acted fraudulently against the respondent in using the power of attorney granted by the respondent to transfer his undivided half share to the first appellant himself.

(2) Whether the first appellant, second appellant, third appellant and fourth defendant have conspired to defraud the respondent of his undivided half share in the said land.

(3) Whether the second and third appellants and their nominee the fourth appellant are bona fide purchasers of the said undivided half share from the first appellant.

On 23 January 1998, we unanimously dismissed with costs the appeal of the first appellant. We unanimously allowed the appeal by the second, third and fourth appellants with costs here and below. We also dismissed the respondent's cross-appeal with costs. We now give our reasons for doing so.

First issue: whether the first appellant was fraudulent

The 1980 agreement between the first appellant and the respondent was prepared by the first appellant. As can be seen from the document itself, it was a three-page agreement with six clauses. The power of attorney which is in cl 4 covers half the agreement. Clause 6 is the usual clause binding on successors in title and assigns. Nowhere is it stated in the agreement that time is the essence of the contract. We have considered carefully as to what is the true nature of this document, where the respondent is described as the vendor and the first appellant the purchaser. For the purposes of this appeal it is necessary to reproduce cll 1, 2, 3 and 5:

> 1 In consideration of the sum of dollars thirty five thousand ($35,000) only paid by the purchaser to the vendor (the receipt whereof the vendor hereby acknowledges), the vendor as the sole executor hereby agrees to sell, transfer and assign all his right, title and interest of and in the said properties to the purchaser free from all encumbrances at RM5 per sq ft.
>
> 2 The balance of the purchase price shall be paid within twelve (12) months from the date hereof.
>
> 3 In the event that the state government acquires the said properties or any part thereof, such acquired area should be deducted from the purchase price.
>
> 4 ...

A 5 Should the purchaser fail to complete the purchase, the deposit of $35,000 shall be refunded to the purchaser together with any other sums which may be advanced to the vendor and this power of attorney shall be null and void.

Clause 4 as we have indicated is very lengthy and we are of the view that there is no necessity to reproduce it. It is sufficient for us to state that by cl 4, the respondent 'irrevocably appoints the purchaser as his true and lawful attorney to enable the purchaser to deal with the said properties in all respects as if the purchaser were the owner thereof until the ownership of the said properties has been registered in the name of the purchaser and/or his nominees in the name or names of any subsequent purchaser'. The clause confers very wide powers on the first appellant as attorney, among them under (iv):

> In my name to sign and execute any contracts, conveyances, assignments, transfers, leases, mortgages, charges, deeds and instruments whatsoever.

Looking at the 1980 agreement, we are of the opinion that it is in the nature of a sale and purchase agreement for valuable consideration to be completed within a period of 12 months. It is just like the sale agreement of Seah Swee Mong, which had been duly completed. Under the terms of the 1980 agreement, the first appellant had a contractual obligation to pay the purchase price within the completion period of 12 months. On the face of it, the transaction does not appear to be unconscionable. We are fortified in our view by para 2(3) of the grounds of the respondent, verified by his statutory declaration, when he applied for the entry of his private caveat on 5 May 1990 by which he caveated the whole of Lot 3287, Lot 6081 and Lot 6082. The respondent in para 2(3) talks of the first appellant's failure to complete within the 12-month period. Paragraph 2(3) reads as follows:

> The caveatee failed, neglected and/or refused to complete the purchase of my ½ undivided share within the stated 12 months from 26 February 1980 stipulated in the said document.

The respondent gave evidence against the first appellant, whereby the respondent accused the first appellant of using undue influence, breach of trust and fraud. But one single overt act had assumed prominence and had overtaken the accusations of undue influence and breach of trust against the first appellant. That overt act is the transfer of the respondent's one half undivided share in the three lots of land by the first appellant to himself by using the power of attorney granted by the respondent and simultaneously charging it to the bank without the knowledge and consent of the respondent. The question is whether the first appellant's act constitutes fraud.

The definition of 'fraud' in s 17 of the Contracts Act 1950 is very wide. Section 17 of the Contracts Act 1950 is as follows:

> 'Fraud'
>
> 'Fraud' includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

(a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;

(b) the active concealment of a fact by one having knowledge of belief of the fact;

(c) a promise made without any intention of performing it;

(d) any other act fitted to deceive; and

(e) any such act or omission as the law specially declares to be fraudulent.

A distinction is drawn between criminal fraud and civil fraud in the recent Federal Court decision in the case of *Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (Personal representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45, which will have a bearing on the standard of proof by the person alleging fraud. At p 59, Mohd Azmi FCJ in delivering the judgment of the court said:

> From the wide definition of 'fraud' under s 17 of the Contracts Act 1950, and as well as the leading authorities on the subject, where the allegation of fraud in civil proceedings concerns criminal fraud such as conspiracy to defraud or misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt, and not on balance of probabilities. It is now well established that an allegation of criminal fraud in civil or criminal proceedings cannot merely be based on suspicion or speculation. In allowing the appeal in *Lau Kee Ko & Anor v Paw Ngi Siu*, the Federal Court reversed the judgment of the High Court on the finding of a civil fraud in a non-disclosure dispute wherein the plaintiff was led to think that he was contracting with the owner when in point of fact he was contracting with an agent. The fraud alleged was purely civil in nature and based on whether there was any personal consideration when the plaintiff entered into the contract, and on that basis the burden of proof was the civil burden. We agree with both counsel that to the extent that the general statement of the law in *Lau Kee Ko* is understood to mean a total rejection of the criminal burden in all cases of fraud, it is no longer good law. But where the allegation of fraud (as the present case) is entirely founded on a civil fraud — and not based on a criminal conduct or offence — the civil burden is applicable.

In the present appeal before us, the evidence shows that the respondent had not terminated the 1980 agreement when the first appellant failed to make full payment within the 12-month completion period. Neither had the respondent revoked the power of attorney at any time thereafter. Had he done so timeously, the first appellant would not be able to use it to transfer the land to his own name. The power of attorney was registered with the office of the Director of Lands and Mines, Johor Bahru, bearing registration No PA Vol 106 Folio 55. According to the first appellant, he did not pay the sum of RM35,000 on signing the 1980 agreement as the respondent was owing him some RM60,000. It was contended by the first appellant that there was a waiver on the part of the respondent. In our opinion, it does not really matter whether there was a waiver or forbearance on the part of the respondent (see *WJ Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 All ER 127 at p 140; and *Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat & Anor* [1992] 2 MLJ 68). According to the evidence of the first appellant, he gave his last loan to the respondent to

A pay his monthly housing instalment on 28 May 1984. The first appellant stated in evidence as follows:

> I stopped because I was financially insolvent because I owe income tax for 12 years back taxes based on the discovery that I purchased the said property from the plaintiff.

B There is no evidence to show that bankruptcy petition had been filed against him. The crux of the matter is that when the first appellant got into this problem with the Inland Revenue in respect of his income tax, without the knowledge and consent of the respondent, and without paying any purchase money to the respondent under the 1980 agreement, he transferred C to himself the respondent's undivided half share in the three lots of land and charged that share to the bank on 7 May 1986 for his own benefit, thus depriving the respondent of his own interest in the property. We are of the opinion that by this overt act, the first appellant had committed fraud within the ambit of s 17 of the Contracts Act 1950.

D There are no express provisions in the 1980 agreement to authorize the first appellant to deduct the purchase price from or set it off against the debt owing by the respondent to the first appellant. Without any proper document to set off the purchase price against the friendly loans to the respondent, the first appellant was not entitled to use the power of attorney to transfer the respondent's undivided half share into his own name. E Further, there is no evidence to show that both the first appellant and the respondent had subsequently rectified the overt act. The two letters of 20 March 1990, in which the first appellant and the respondent agreed to the retransfer for valuable consideration of the said share, in our opinion, cannot be construed as documents of rectification. They do not absolve the first appellant from his wrongful act as nothing came out of these two F letters. The first appellant is a practising advocate and solicitor who should know his duties and obligations. By his act, he had abused the trust and confidence reposed in him as an advocate and solicitor by the respondent.

We respectfully are unable to accept the rather persuasive arguments of Mr Wong Kim Fatt, learned counsel for the first appellant, advanced by G him in his oral and written submissions on behalf of the first appellant because we could not find anything in the submissions to justify the wrongful act of the first appellant. Though Mr Chew (the solicitor) gave evidence that he had explained the terms and conditions of the 1980 agreement to the respondent before he signed it, the fact remains that at H the material time he had no independent solicitor to advise and act for him in the transaction. It is common ground that Mr Chew never acted as the respondent's solicitor. As the first appellant was an interested party and there was a conflict of interest, he should have advised the respondent and insisted that the latter be represented by his own solicitor, so that any fraudulent act or improper conduct could be avoided in the best interest I of both the contracting parties.

The learned trial judge was, on the evidence, right in law in finding fraud against the first appellant. We agree with the observations of the learned judicial commissioner cited by the learned judge on the professional conduct of advocates and solicitors in *Letchemy Arumugan v N Annamalay* [1982] 2 MLJ 198 at p 201:

> Where a party, especially an ignorant or illiterate one, is unrepresented by an advocate and solicitor in a transaction and the opposite party is represented by one, it is the duty of the advocate and solicitor to explain the terms and conditions of the contract and the legal consequences thereof fully and frankly to the unrepresented party and ensure that this unrepresented party understands the terms and conditions and legal consequences fully, so that neither of the contracting parties has any unfair advantage over the other. Where there is a conflict of interest, as in this case, the advocate and solicitor should advise the plaintiff to be separately represented. The advocate and solicitor must at all times maintain his professional ethics, honesty, integrity and independence. He should never abuse his special position and the confidence reposed in him if he is [to] maintain the public respect for and confidence in the legal profession.

There is sufficient evidence to support the learned judge's findings of undue influence and breach of trust committed by the first appellant against the respondent. We see no reason to interfere with those findings.

Second issue: conspiracy to defraud

The respondent's evidence on conspiracy is not credible. When confronted with a direct question as to how the fourth defendant had conspired to defraud, the respondent answered as follows:

> When I met Mr Han in mid 1993, he said I had a 50-50 win case against second and third defendants. I also feel that Mr YY Han is protecting Ong Ban Chai.

On the evidence, we agree with the learned judge that the respondent had failed to prove his case against the fourth defendant. In this respect, the learned judge in his judgment (where he referred to the first appellant as OBC) made his findings as follows:

> It is my finding that the plaintiff has failed to prove his case against the fourth defendant that —
>
> (a) they had full knowledge of OBC's alleged fraud and unlawful act; and
>
> (b) that they fraudulently and unlawfully conspired with OBC, the second and third defendants to perpetrate the alleged fraud and unlawful act of OBC.
>
> It is clear that the fourth defendant was not in the picture prior to the signing of the 1989 agreement and on being retained by the second and third defendants, they took all proper and lawful steps which any reasonable and prudent solicitor would have done to carry out his client's instructions — there was nothing unlawful about the steps they had taken in the instant case.

It is significant to note that the respondent had not challenged the above specific findings of the learned judge as he did not appeal against such findings which are against his case. It is also significant to note that the learned judge found that the respondent had failed to prove the conspiracy charge against the first, second, third appellants and the fourth defendant.

The respondent had also not appealed against such specific findings of the learned judge on no conspiracy to deprive him of his property. The learned judge in his judgment said:

> On the whole, it is my view that the plaintiff has failed to prove that the defendants have conspired to deprive him of his property. A tort by definition is an actionable wrong causing damage. The plaintiff has failed to prove that he suffered damage in relation to the charge of conspiracy and it is my finding that he is not entitled to the declaration that he has sought for on this charge.

Failure on the part of the respondent to appeal against the above specific material findings by the learned judge would inevitably mean that the respondent had accepted those findings which would have the legal effect of totally demolishing his charge of conspiracy to defraud. In other words, the first, second and third appellants and the fourth defendant had been cleared of the charge of conspiracy to defraud the respondent. Had there been an appeal against such an acquittal of conspiracy to defraud, we would be reluctant to reverse the findings of the learned trial judge on the evidence before us. In this connection, it may not be inappropriate for us to refer to the short passage in the judgment of Lord Jenkins in the Privy Council case of *Baron Uno Carl Samuel Akerhielm v Rolf De Mare & Anor* [1959] AC 789. The passage appears at p 806:

> ... Their Lordships would add that they accept, and would apply in the present case, the principle that where a defendant has been acquitted of fraud in a court of first instance the decision in his favour should not be displaced on appeal except on the clearest grounds (see *Glasier v Rolls* (1889) 42 Ch D 436; 5 TLR 691).

Third issue: whether the second, third and fourth appellants are bona fide purchasers

Learned counsel for the respondent contended that the second, third and fourth appellants are not bona fide purchasers as their minds had been infected by knowledge of the adverse claim of the respondent. He relied on the letter dated 12 April 1990 given by the respondent's solicitors and the letter of 10 May 1991 written by the solicitors for the second and third appellants to the first appellant. Learned counsel further contended that at the material time the second, third and fourth appellants had not paid the full purchase price to the first appellant and as such they could not be said to be bona fide purchasers. He relied on the case of *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770.

It is clear to us that the fourth appellant is the nominee of the second and third appellants. As such, the fourth appellant cannot succeed if the second and third appellants fail in their appeal. For reasons best known to themselves, Mr Wong Kim Fatt appeared as counsel for the second and third appellants while Mr Manjit Singh appeared as counsel for the fourth appellant. It is convenient to take their arguments together. It was contended by them that at the time when the 1989 agreement was executed, there was no caveat on those lands and as such the second and third appellants were entitled to rely on s 89 of the National Land Code 1965 ('the NLC') on the conclusiveness of the register. It was also contended that both the appellants were bona fide purchasers for value and their nominee, the fourth appellant, is protected under the provisions of s 340(3) of the NLC, and the removal of the respondent's caveats was found to be in order by the learned judge. The first appellant had been fully paid his purchase

price and the fourth appellant had acquired indefeasibility of title when it became the registered proprietor of the undivided half share on 10 May 1994. It was further contended that knowledge of an adverse claim cannot defeat the registered title of the fourth appellant.

In our view, anyone making a title search on the date of the execution of the 1989 agreement would only see the name of the first appellant as registered proprietor of the half share, and not the claim of the respondent on the register document. The second, third and fourth appellants are entitled in law to rely on the conclusiveness of the register document of title as provided under s 89 of the NLC, which is modelled on the Torrens system. In the case of *Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7, a Federal Court decision, Ali Ag CJ (Malaya) said at p 12:

> ... The importance of the register document of title in terms of s 178(3) of the Code read with s 89 is that it is conclusive evidence that title to the land in question is vested in the appellant. ...
>
> There is also another much more important reason why this appeal should be allowed. Under the Torrens system the register is everything. So said SK Das on p 102 of his book on the Torrens system in Malaya. I need only refer to two Privy Council cases, *Creelman & Anor v Hudson Bay Insurance Co* [1920] AC 194 and *Alan Frederic Fraze v Douglas Hamilton Walker* [1967] 1 AC 569 which decided to the same effect.

The caveats of the respondent were entered after the execution of the 1989 agreement against the whole of the three lots of land on 5 May 1990, when he claimed only one half of each lot. The caveats are therefore defective and cannot be allowed to remain on the register (see *Mosbert Bhd v Stella D'Cruz* [1985] 2 MLJ 446). Had the respondent entered a valid private caveat before 28 February 1989 when the 1989 agreement was signed, the situation might well have been different, for his private caveat on the register document would serve as a notice of his claim to an interest in the land to the world at large under s 323 of the NLC. Eventually, the validity of that claim would have to be determined judicially.

Lord Diplock, commenting on the doctrine of notice under the Torrens system of land registration and conveyancing as applied by the NLC, made the following succinct and significant observation in the Privy Council case of *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 at p 214:

> The system of private caveats is substituted for the equitable doctrine of notice in English land law.

In *Wu Shu Chen (Sole executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487, the Court of Appeal affirmed the decision of the High Court in ordering the removal of the caveat which failed to disclose the 'certain document' notwithstanding it was entered in 1989 before Raja Zainal's purchase of the land in 1993. In the present appeal before us, the evidence shows that the respondent had not filed his appeal within the three-month statutory period under s 418 of the NLC against the act of removal of the caveats by the Registrar of Titles. During the trial, the respondent had admitted under cross-examination sometime in September 1994 he was informed by his solicitors of the removal of the caveat in March 1994. He did not appeal against that act of the Registrar to remove the caveats. With the removal of the

respondent's caveats on 20 March 1994, the obstacle blocking the registration of the title in favour of the fourth appellant was also removed. If the respondent claimed that the removal of the caveats was done without notice to him and therefore done improperly, he should have availed himself of his statutory right of appeal under s 418 of the NLC for appropriate legal remedies as soon as he was informed of it by his lawyer. Section 418 reads as follows:

> (1) Any person or body aggrieved by any decision under this Act of the State Director, the Registrar or any Land Administrator may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the Court.
>
> (2) Any such appeal shall be made in accordance with the provisions of any written law for the time being in force relating to civil procedure; and the Court shall make such order thereof as it considers just.
>
> (3) In this section 'decision' includes any act, omission, refusal, direction or order.

The respondent must be taken to have accepted the removal of his caveats since he failed to challenge it under s 418(1) of the NLC when he had the opportunity. From the evidence of Mr YY Han, it is clear to us that the respondent was forewarned of the intention to remove the caveat before it was removed. There is no evidence of any attempt by the respondent to resist that removal. The three-month statutory period for appeal had long expired and we regret to say that it is far too late in the day for the respondent to challenge the act of removal of the Registrar of Titles: see *Land Executive Committee of the Federal Territory v Syarikat Harper Gilfillan Bhd* [1981] 1 MLJ 234. The respondent cannot be allowed to take advantage of his own omission or default.

In our opinion, the learned trial judge, having found in his judgment that 'the plaintiff has failed to prove that the defendants have conspired to deprive him of his property' and that the removal of the caveats of the respondent was also to be in order, should have found the title of the fourth appellant indefeasible and protected by s 340(3) of the NLC. The learned judge in his judgment said:

> Looking at the above, I cannot see how the plaintiff can maintain his charge of conspiracy. The above acts by themselves are not unlawful neither were they brought by unlawful means. The fact that the defendants may have a motive for doing those acts is irrelevant. I would have thought that the second and third defendants have a right to intervene if they felt that at that time they had an interest in the subject property having entered into the 1989 Agreement. To me, there is also nothing to preclude them from filing a suit against OBC and Swee Mong for specific performance of the 1989 agreement no matter what their motive was. Their act of removing the caveats would also be in order and I would have thought that they have every right to do so if they do it pursuant to the law. With regard to the second and third defendants' request for an adjournment of the plaintiff's application to strike out their statement of claim as co-plaintiffs, I would think that there is nothing unlawful about that — whether it will be granted would depend on whether the court feels that the situation merits it.

The unchallenged findings of the learned judge clearly show a total absence of dishonesty on the part of the second, third and fourth appellants as well as their solicitors.

As stated earlier, the respondent had failed to appeal against the specific finding of no conspiracy in favour of the appellants. This failure on the part of the respondent to appeal in order to challenge the specific findings of the learned judge is, in our view, fatal to the respondent's case of conspiracy, especially when one of the alleged conspirators, ie the fourth defendant firm of solicitors is not a party to this appeal. It will be wholly unjust to make an adverse order against this firm of solicitors when it is not a party to this appeal.

Now, we would like to refer to the letters upon which the allegation of conspiracy was said to occur. The first letter is the letter dated 12 April 1990 written by M/s Arthur Lee & Co as solicitors for the respondent to M/s Zaman & Associates, the former solicitors for the second appellant (Mr Ong Chin Eng) and third Appellant (Mr Toh Chiew Kwee):

> M/s Zaman & Associates 12 April 1990
>
> Dear Sirs,
>
> Re: All those pieces of land held under CT 2092 for Lot 3287, CT 12970 for Lot 6081 and CT 12971 for Lot 6082 containing an area of 163,894.5 sq ft or thereabouts situated in the township of Johor
>
> We are instructed that you act for Mr Ong Chin Eng and Mr Toh Chiew Kwee who have entered into an agreement with Mr Ong Ban Chai @ Ong Kah Liew and another, Mr Seah Swee Mong to purchase, inter alia, Mr Ong Ban Chai @ Ong Kah Liew's purported one half (½) undivided share in the abovementioned property.
>
> THIS IS TO PUT YOU ON NOTICE that we have been instructed hy Mr Seah Siang Mong of 115, Jalan Maju, Taman Pelangi, 80400 Johor Bahru to take the necessary legal proceedings to vacate the transfer of our client's one half (½) undivided share in the abovementioned property into Mr Ong Ban Chai @ Ong Kah Liew's name which said transfer was effected by Mr Ong Ban Chai @ Ong Kah Liew without our client's knowledge (until recently), and purportedly by the use of a document which our client instructs us is invalid, null and void and/or in circumstances which would defeat Mr Ong Ban Chai @ Ong Kah Liew's purported indefeasible title to the said one half (½) undivided share.
>
> Yours faithfully,
>
> Sd
>
> cc Mr Seah Siang Mong

We have examined this letter carefully and found that in effect it is nothing more than a notice of an adverse claim which had to be proven in court. It did not allege fraud and was given after the second and third appellants had executed the 1989 agreement.

The second letter we would like to reproduce is the letter dated 10 May 1991 written by the fourth defendant firm as solicitors for the second and third appellants to the first appellant's legal firm, M/s Ong Ban Chai & Co:

M/s Ong Ban Chai & Co 10 May 1991

Dear Sirs,

Re: Sale and Purchase of properties held under CT 2092 Lot 3287, CT 1297 Lot 6081 and CT 1297 Lot 6082 all in the township of Johor Bahru

We refer to the telephone conversation between your Mr Ong and our Mr Han regarding the above matter.

We are pleased to inform you that our clients are agreeable to complete the sale and purchase of the abovementioned properties. However, in view of the facts that the said properties have now been encumbered by one Mr Seah Siang Mong and there is a pending suit at the High Court over this matter, our clients have instructed us to find out from you whether you are prepared to accept our clients' terms and conditions as hereinafter specified before our clients agree to pay the full balance of the purchase price, viz:

(1) The full balance of the purchase price shall be paid to you less the amount due to the income tax department which shall be retained by us.

(2) Upon the full payment of the balance of the purchase price as aforesaid you shall execute a deed of assignment and an irrevocable power of attorney in favour of our clients authorizing our clients, inter alia, to apply to the appropriate authorities for conversion, layout plan and building plans for the said lands.

(3) The original title deeds shall be delivered to us for custody pending final registration of transfer of the same to our clients.

(4) An irrevocable undertaking from you to undivided one half share of the said lands in the event that the High Court should decide the pending civil suit against you.

Upon confirmation of the above we shall advise our clients to do the necessary actions.

Yours faithfully,

Sd

cc Mr Ong Chin Eng & Mr Toh Chiew Kwee

Our reading of this letter is that the writer referred to the respondent's caveats of 5 May 1990 when using the words 'encumbered by one Mr Seah Siang Mong'. The claim of the respondent against the appellant had yet to be proven in court. There is nothing in the letter to show that the fourth defendant and its clients had personal knowledge of or actually participated in any fraud committed by the first appellant. The said letter showed prudence on the part of the fourth defendant firm to safeguard the interest of the second and third appellants who were its clients. Condition 4 appears to us to contradict any allegation of conspiracy and also the writer's personal knowledge of fraud of the first appellant. Further, the letter stands to show that second and third appellants are bona fide purchasers. If the two letters were intended to show constructive or equitable fraud, they did not also advance the cause of the respondent. In respect of both, we would like to refer to what Gill CJ (Malaya) said in the case of *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85 where at p 88 he said:

There is, however, an important exception to the above rule in cases of fraud, which is stated in *14 Halsbury's Laws of England* (3rd Ed) para 1019 at p 543 as follows:

> 'Under the head of actual notice is included notice to an agent employed in the transaction. The notice is imputed to the principal, and it affects him whether communicated to him or not; but an exception is admitted where there has been fraud on the part of the agent in the matter. Although actual communication to the principal is not required, yet fraud excludes in practice all probability of communication, and hence the knowledge of the fraudulent agent is not imputed to the principal.'

It is thus clear that his solicitor's knowledge of fraud, if any, cannot be imputed to the respondent. I must therefore reject the appellant's contention that if the respondent had notice by his agent of the previous transactions, then his entering into an agreement to purchase the premises was tantamount to fraud.

It is contended for the appellant that if the respondent had knowledge by his agent of the illegality of the loan transaction and consequently of the transfer by Chooi Mun Sou to the nominee company being void, he cannot be a bona fide purchaser. The authority relied on for this contention is the old case of *Le Neve v Le Neve* (1747) Amb 436; 26 ER 1172. But the doctrine of constructive notice, which is all that the respondent can be said to have had in this case, is inapplicable, as a rule, to systems of registration in relation to transactions where priority and notice are governed by priority in or the fact of registration. (See 14 *Halsbury's Laws of England* (3rd Ed) para 1023 at p 545.) Where the effect of constructive notice would be to invalidate a transaction in relation to sale of land, the court will not readily apply the doctrine. (See 14 *Halsbury's Laws of England* (3rd Ed) para 1022 at p 545.)

...

It is next submitted on behalf of the appellant that questions as to the illegality or otherwise of the loan agreement and allegations of fraud and deceit cannot be decided on affidavits. But, as I have already said, there is no dispute as regards the facts of the case. There were no allegations of actual fraud on the part of the respondent. The learned judge had before him all the documentary evidence which is relevant to the case. It is to be observed that the loan agreement was made two years before the transfer of the premises to the respondent. It was in the light of all that evidence and on the legal arguments addressed to him on such evidence, that he had to decide whether the appellant was entitled to have leave to defend. I need hardly add that were the case to go to trial in court it would necessarily have to be decided on that documentary evidence and legal arguments arising therefrom. *The utmost that could be said against the respondent is that he is guilty of constructive or equitable fraud. But it is clear that 'fraud' within the meaning of the National Land Code means actual fraud and not what is known as constructive or equitable fraud.* (See *Assets Co Ltd v Mere Roihi & Ors* [1905] AC 176 and *Tueh Guat Choo @ Tin Wat Choo (f) v Cheah Ah Hoe & Anor* [1932] MLJ 109.) (Emphasis added.)

The Privy Council in *Assets Co Ltd* v *Mere Roihi & Ors* [1905] AC 176 held that 'fraud' in the Torrens system means 'actual fraud'. It was later held by the Privy Council in the leading and frequently cited case of *Waimiha Sawmilling Co Ltd (In Liquidation) v Waione Timber Co Ltd* [1926] AC 101 that knowledge of pending litigation and adverse claim did not amount to fraud. These two cases were applied by the Federal Court in *Datuk*

A *Jagindar Singh & Ors v Tara Rajaratnam* [1983] 2 MLJ 196, where Lee Hun Hoe CJ (Borneo) said at p 200:

> ... However, the Privy Council has made clear in *Assets Co Ltd v Mere Roihi & Ors* that 'fraud' in the Torrens system means 'actual fraud' and not 'constructive or equitable fraud'.

B At p 201, his Lordship said:

> ... In a subsequent case of *Waimiha Sawmilling Co Ltd (In Liquidation) v Waione Timber Co Ltd*, the Privy Council held that a registered proprietor who took a transfer with actual knowledge of an existing adverse claim against his transferor, acquired an indefeasible title as his mere knowledge
C of the existence of the adverse claim did not amount to fraud.

In *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81, Abdul Hamid FJ (as he then was) held that fraud must be actual, not constructive or equitable. The learned judge at p 85 said:

> As we stated earlier, the essential question that must be determined is
D whether the appellant was a party or privy to any fraud the chargor was guilty of. And the question is one of fact. The law is clear that the onus is upon the respondents to prove beyond any reasonable doubt that there was fraud, not constructive or equitable fraud but actual fraud. The appellant must be shown to be guilty of an act involving 'dishonesty — a wilful and conscious disregard and violation of the right of other persons'. (*Waimiha*
E *Sawmilllng Co Ltd (In Liquidation) v Waione Timber Co Ltd.*)

In the present appeal, we are of the view that the two letters did not show evidence of any fraud, not even constructive or equitable fraud on the part of the second and third appellants. At the most, the two letters show nothing more than knowledge on the part of the second and third appellants
F of an adverse or rival claim by the respondent to the half share in the three lots of land which had been registered in the name of the first appellant on 7 May 1986 free from encumbrances.

It is interesting to note that in the present appeal before us, the arguments advanced on behalf of the respondent are somewhat similar to
G those advanced for the appellants some 70 years ago in the *Waimiha Sawmilling* case, where one Howe removed the caveat so that he could deal with his land. At the time of the registration of the dealing in the land, there was pending litigation affecting the land. There was no appeal from the order discharging the caveat, just like the present respondent who did not challenge by appeal the removal of his caveats. In discussing the appeal
H of the appellants in the Privy Council, Lord Buckmaster said at p 104:

> The appellants support their case by two independent arguments: (1) that there was actual fraud committed in obtaining the registration of Wilson as the absolute owner; (2) that as at the date of this registration litigation was pending affecting the property, the title was necessarily subject to whatever
I rights the appellants would be held to possess if this litigation resulted in their favour.

The above two arguments are dealt with at p 107 by his Lordship whose observations are directly relevant to the present appeal:

> ... Howe being prevented from dealing with his lands expressly removed the caveat in order that those dealings should not be delayed. Had that judgment

been appealed against and the order of Sim J reversed, different considerations might have arisen, but it was left unchallenged, and all that Howe did was to act upon the hypothesis that it was sound and to attempt to strengthen the position as far as possible by speedy completion of the transaction. Even now no attempt has been made to question the judgment of Sim J, and that circumstance, in their Lordships' opinion, alone is sufficient; for the learned judge, with full knowledge of the facts, held that the hindrance to dealing with the property caused by the entry of the caveat should be removed, and even if he was wrong in the view that he took it seems to their Lordships impossible to say that people who acted upon the faith of that judgment were guilty of fraud.

The second question can be dealt with briefly. In their Lordships' opinion, the judgment of Hosking J is complete and unassailable upon this point. Litigation is the means by which a disputed interest in the land can be established. If knowledge of the interest itself does not affect a registered proprietor knowledge that steps are being taken to assert that interest can have no more serious effect.

The *Waimiha* case was also applied by Edgar Joseph Jr J (as he then was) in *Goh Hooi Yin v Lim Teong Ghee & Ors* [1990] 3 MLJ 23, where at p 32 he said:

The facts in the *Waimiha* case are noteworthy. There the registered proprietor of land, Howe, granted timber rights to the appellant which protected its agreement by caveat. Howe purported to determine the appellant's interest for breach of covenant. The appellant appealed against a judgment upholding Howe's re-entry. While the appeal was pending, Howe sold the land to Wilson who was acting as agent for a company to be formed, the respondent. Howe obtained an order for removal of the caveat (against which the appellant did not appeal) and transferred the land to Wilson. Wilson later transferred the land to the respondent. The appellant's appeal against the judgment upholding Howe's re-entry was itself held.

Notwithstanding that Wilson knew of the appellant's claim and of the litigation between it and Howe, the Privy Council held that there had been no fraud on the part of the respondent.

The case shows that there is no fraud on the part of the registered proprietor in merely acquiring title with notice of an existing unregistered interest or in taking a transfer with knowledge that its registration will defeat such an interest. (See also *Mills v Stokman* (1967) 116 CLR 61.) (Emphasis added.)

We are of the opinion that the learned trial judge, having cleared the second and third appellants and also the fourth defendant of the conspiracy charge, should have held that knowledge of the respondent's adverse claim would not prejudice their case, especially when he found that removal of the respondent's caveats was in order. He should have held that the so called 'infection of the mind', if any, is curable in law and could not be a permanent impediment. In our opinion, 'infection of the mind' cannot be infection by virus or bacteria, in which event the patient should consult a doctor to seek a cure. In the present context, 'infection' must mean 'legal infection' of a sort in which the cure is by legal means in which the remedy is to be given by the courts, that is if the party concerned is entitled in law to such remedy.

The trial judge's decision that a person is not a bona fide purchaser until he has paid the full purchase price is based on the Court of Appeal

judgment in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770, citing the judgment of Gopal Sri Ram JCA at p 820:

> Now, I take two matters as settled law. The first is the proposition that one is not a bona fide purchaser until one has paid all one's money under the contract for sale. A person who pays only a deposit and, under the terms of a written or oral contract agrees to pay the balance later (in the present case after three months), is not a bona fide purchaser. I need only cite two authorities. The first is *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85. The second is *M & J Frozen Food Sdn Bhd v Siland Sdn Bhd* [1994] 1 MLJ 294.

The Court of Appeal in the *Aik Ming* case by analogy applied s 26(b) of the Specific Relief Act 1950, dealing with specific performance of a contract. Section 26 of this Act reads as follows:

> Relief against parties and persons claiming under them by subsequent title
>
> Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against —
>
> (a) either party thereto;
>
> (b) any other person claiming under a party to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract.

The present appeal is not concerned with the question whether the court should grant specific performance of a contract of sale.

In *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85, Gill CJ (Malaya) (as he was then) delivering the judgment of the court held that the respondent there could not be said that he was not a purchaser for value because he had paid only 10% of the purchase price. The learned Chief Justice at p 88 said:

> It is said that the respondent cannot claim to be a purchaser for value without notice because he had not paid the full purchase price. The authority relied on for this assertion is the New Zealand case of *Morland v Hales and Somerville* (1911) 30 NZLR 201 in which it was said that Somerville could not claim as purchaser for value without notice, as his contract had not yet been completed by payment of the purchase price and the conveyance of the legal estate. But here the legal estate was conveyed to the respondent by an instrument of transfer which was duly registered. It is true that he paid only 10% of the purchase price in cash, but he executed a charge on the property to secure payment of the balance of the purchase price. It therefore cannot be said that he is not a purchaser for value.

In *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294, the first appellant company was the successful purchaser at a public auction sale. It paid 25% of the purchase price but failed to pay into court the balance within the stipulated period of 30 days. The first appellant applied for and obtained an extension of time to pay the balance, but without naming the first respondent chargor as a party to its application for extension. The first appellant eventually paid the balance of the purchase price one year after the date of completion and became the registered proprietor of the land. The Supreme Court set aside the registration of the first appellant as proprietor, because failure to comply with ss 258 and

251(1) of the NLC was an illegality which struck at the root of the chargor's right to be heard. The default was clearly on the part of the first appellant purchaser which could not be allowed to benefit from its own default. A

In the present appeal before us, the learned trial judge applied *Aik Ming* case and his reasons in his judgment are as follows: B

> Since the second and third defendants have only paid a deposit when they executed the 1989 agreement and have yet to pay the balance of the full purchase price in May 1990, they are clearly not bona fide purchasers. Their minds have become infected with knowledge of the plaintiff's adverse claim and they were put on alert as to OBC's right to convey title of the subject property. Notwithstanding such knowledge, they proceeded to pay, as shown by their own evidence, through the fourth defendant, the balance of the purchase price and completed the transaction. C

Is the trial judge correct in his interpretation of *Aik Ming* case? We therefore need to consider what is the ordinary meaning of the expression 'bona fide' as ordinarily used and understood. The meaning of the D expression 'bona fide' may be found in legal dictionaries, eg *Stroud's Judicial Dictionary* and *Words and Phrases* and also in numerous judicial decisions. We found that the common factor in all bona fide transactions is the absence of fraud, deceit or dishonesty. In other words, they are entered into in 'good faith' for valuable consideration. The expression E 'good faith' in English is used synonymously with the Latin expression 'bona fide'.

In the present appeal before us, the material question is: when the second and third appellants entered into the 1989 agreement to purchase the three lots of land on 28 February 1989, having regard to the fact that the first appellant was on that date the registered proprietor of the half F share of the three lots of land in question free of any trust and also free of any caveat by the respondent, did they acquire them in good faith and for valuable consideration? If the answer is in the positive, then the title of the fourth appellant is indefeasible; if otherwise, the title is defeasible. With respect, we are of the opinion that s 26(b) of the Specific Relief Act 1950 G has no application to the present appeal.

For the purpose of this appeal, we are of the view that s 340 of the NLC in respect of indefeasibility of title is very important. We hereby reproduce s 340(1), (2) and (3):

> (1) The title or interest of any person or body for the time being registered H as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible —
>
> (a) in any case of fraud or misrepresentation to which the person or I body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2) —

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

It was submitted by learned counsel for the fourth appellant that the fourth appellant is entitled to full protection under the proviso to s 340(3) of the NLC. This proviso is a special provision designed to protect the registered interest of the fourth appellant which acquired the registered interest from the previous registered proprietor who is the first appellant.

Section 340(1) and (3) received full judicial consideration in the recent Court of Appeal decision in *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62 where the court had the opportunity to consider and decide whether indefeasibility under s 340(2) is deferred or immediate. Delivering the judgment of the court, Gopal Sri Ram JCA at p 84 said:

> First, we are of the opinion that the proper approach is to interpret s 340 of the NLC as a whole, uninfluenced by any judicial or academic comment upon its effect. When read as a whole, the section makes it clear that, save in the limited cases enumerated in its second subsection, the title of a registered proprietor shall be indefeasible; that is to say, that it cannot be impeached. But such title, in the words of the legislature, 'shall not be indefeasible' in each of the instances set out in the second subsection to s 340. This means that in each situation envisaged by the NLC under s 340(2), the title of a registered proprietor shall be defeated or, in other words, liable to be set aside.

On s 340(3), at p 85 his Lordship said as follows:

> It follows from what we have said in the preceding paragraph — and this is the fourth reason we advance for disagreeing with the learned judge — that s 340 is constructed in such a fashion as to make defeasible only the title of the immediate acquirer of land. The section, however, protects a purchaser who, in good faith and for valuable consideration, acquires title to land. It also protects the successors in title of such a purchaser. In our judgment, the words 'any purchaser' appearing in the proviso to s 340(3) do not include a registered proprietor whose immediate title is rendered defeasible by one or more of the vitiating elements specified in the second subsection to s 340 of the NLC. Any other construction would, in our view, denude sub-s (2) of all effect. The section should be read as making defeasible the title of a proprietor who gets onto the register by means of one or more of the methods specified in the second subsection. However, if such a registered proprietor were to dispose of the land to a third party who, in good faith, pays the purchase price, then, the latter, as well as all those who come into the register after him, take title free of any taint.

On the evidence, we are of the opinion that the title of the fourth appellant in respect of the one half share of the first appellant in the three lots of land is indefeasible under s 340(3) of the NLC. It was acquired in good faith

and for valuable consideration from the first appellant as registered proprietor through the second and third appellants against whom the respondent had failed to prove conspiracy to defraud. Registration of the said one half share in the name of the first appellant should not be set aside. The learned judge had erred in law in ordering the half share to be registered in favour of the respondent, to whom the learned judge had ordered the first appellant to pay costs and damages. In our opinion, although we sympathize with the predicament of the respondent, it is wholly unjust to penalize the second, third and fourth appellants for the fraud of the first appellant as well as the omission of the respondent himself to challenge by appeal the specific findings of the learned judge and on the removal of his caveats adverted to earlier in this judgment. In this connection, we find the following passage from the judgment of Lord Diplock in the *Eng Mee Yong* case at p 214 to be helpful in our consideration of the case of the fourth appellant in the present appeal:

> The Torrens system of land registration and conveyancing, as applied in Malaya by the National Land Code 1965, has as one of its principal objects to give certainty to title to land and registrable interests in land. Since the instant case is concerned with title to the land itself, their Lordships will confine their remarks to this, though similar principles apply to other registrable interests. By s 340, the title of any person to land of which he is registered as proprietor is indefeasible except in cases of fraud, forgery or illegality, and even in such cases a bona fide purchaser for value can safely deal with the registered proprietor and will acquire from him an indefeasible registered title.

In coming to our decision, we had the advantage and benefit of the judgment of the Federal Court consisting of five judges in the case of *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465. At the time when the learned trial judge gave his decision and when this appeal was heard, the Federal Court had not delivered its decision yet. Before we made our decision, the judgment of the Federal Court in the *Pekan Nenas Industries* case was delivered. Learned counsel for the appellants, Mr Wong Kim Fatt, drew our attention and the attention of the respondent's counsel, Mr Arthur Lee, to this judgment. Mr Wong Kim Fatt extended to us and Mr Arthur Lee copies of the judgment which was reported at [1998] 1 MLJ 465 without any submission to which Mr Arthur Lee responded.

This case has been hailed to be a landmark judgment of the Federal Court where it rejected the proposition that one is not a bona fide purchaser unless one has paid the full purchase price under the contract of sale as propounded by the Court of Appeal in the *Aik Ming* case, on which the learned trial judge had based his decision. The Federal Court decided that to be a bona fide purchaser one should have contracted in good faith for value, and that knowledge of an adverse claim is not fraud. The material time is the time of the transaction. We observe that the Federal Court found in favour of the intervener/purchaser ie the appellant company, which paid the balance of the purchase price when the second caveat was still subsisting. Delivering the judgment of the Federal Court, Edgar Joseph Jr FCJ said at p 508:

A The material time at which there must be knowledge or the means of knowledge is the time of entry into the transaction. (See *Kanssen v Rialto (West End) Ltd* [1944] Ch 346; *Morris v Kanssen* [1946] AC 459.)

His Lordship had the opportunity to reaffirm in greater detail in the Federal Court his earlier views in the *Goh Hooi Yin* case in respect of B *Waimiha Sawmilling*'s case.

On the effect of knowledge of litigation and adverse inference, at p 526 Edgar Joseph Jr FCJ said:

> In *Waimiha Sawmilling Co (In liquidation) v Waione Timber Co Ltd*, shorn of side issues, the facts were these: H was the registered proprietor of land C under the New Zealand Torrens system. He entered into a timber agreement with the appellant company, which the company protected by a caveat. Alleging breaches of covenant, H later purported to determine the interest of the company by re-entry on the land. The company contested the validity of the re-entry, and commenced litigation, which became protracted by appeals. While this litigation was pending —
>
> D (a) the land was sold by H to an agent for the respondent company;
>
> (b) H obtained an order from a judge directing removal of the caveat; from this order no appeal was made; and
>
> (c) a transfer to the respondent company was registered.
>
> The litigation ultimately resulted in favour of the appellant company, with E damages against H. Damages proving unavailing, the company sought to have the transfer set aside on the ground that the *taking of title in the face of pending litigation, and with knowledge of it, amounted to actual fraud on the part of the respondent*. Both the Supreme Court of New Zealand and the Privy Council *rejected this plea*. (Emphasis added.)
>
> F The *Waimiha Sawmilling* case is a good illustration of the proposition that the effect of notice of an unregistered interest may not amount to fraud sufficient to defeat a registered proprietor's title.

On the question of bona fide purchasers, his Lordship at p 531 said:

> In our view, therefore, when, as here, there is a dispute between the G immediate parties to a sale and purchase transaction, a bona fide purchaser is not necessarily one who has paid the full purchase price. Much will depend upon the particular circumstances of each case.
>
> We would, therefore, answer the question posed under point (2) in the negative; that is to say, we are unable to agree with the Court of Appeal regarding this part of the case.

H The decision of the Federal Court is binding on us, the Court of Appeal, and the courts below. In a way, the judgment in the *Pekan Nenas Industries* case has made the whole issue clearer and easier for us to make our decision.

In this present appeal, the respondent, in his cross-appeal, sought to I reverse the dismissal by the learned trial judge on the claim for damages. Damages can only flow from a finding of liability for conspiracy and/or misrepresentation on the part of the second, third and fourth appellants. The learned judge on these issues found in their favour, and the fourth defendant is not even a party to this appeal. Adverse to the case of the respondent, there is no appeal against the finding of no liability in favour

of the appellants. There is therefore totally no foundation for the claim for damages. The learned trial judge was right on the evidence in dismissing the respondent's claim for damages and/or misrepresentation. His claim for damages must therefore be dismissed.

In respect of ss 433B and 433C of the NLC, these sections were not in issue at the trial, and they never arose at any time in the course of the trial. The issues for the trial were stated by the learned counsel for the respondent and the trial proceeded on that basis. He stated during his submission in the court below:

> Main issue in the first suit is whether the defendant had been fraudulent or not.
>
> Second issue — if he had been fraudulent whether he had conspired with the second, third and fourth defendants and whether the fifth defendant is a bona fide purchaser for value without notice.

It is too late in the day for the respondent to raise this issue before us. From the record before us, we are unable to find any evidence recorded by the learned trial judge of any contravention of the two sections in question. The Registrar of Titles saw it fit to register the transfer of the three lots of land in favour of the fourth appellant. The relief sought by the respondent must therefore be rejected.

For the above reasons, we made the following orders:

(1) The appeal of the first appellant, Ong Ban Chai, be and is hereby dismissed with costs.

(2) The appeal of the second, third and fourth appellants be and is hereby allowed with costs here and below.

(3) The fourth appellant, ie Bewell Realty Sdn Bhd, be registered as proprietor in respect of the one half (½) undivided share in the three (3) lots of land, namely Lot 3287 held under CT 2092, Lot 6081 held under CT 12970 and Lot 6082 held under CT 12971, township of Johor Bahru, free from incumbrances.

(4) The three (3) documents of title, namely CT 2092, CT 12970 and CT 12971, township of Johor Bahru, deposited in this court be returned to M/s Gulam & Wong, the solicitors for the fourth appellant.

(5) The cross-appeal of the respondent be and is hereby dismissed with costs.

(6) The deposit of the first appellant be paid to the respondent towards account of taxed costs.

(7) The deposits of the second, third and fourth appellants be refunded to them respectively.

We hereby direct the Registrar of Titles Johor under s 417 of the NLC to give effect to our above third order forthwith.

Order accordingly.

Reported by David Lai